**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **JASON A. JOHNSON** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 8,000,139 |
| **BROOKS PLUMBING** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **NATIONWIDE MUTUAL INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Claimant appealed the May 9, 2005, Award entered by Administrative Law Judge Kenneth J. Hursh. The Board placed this claim on its summary docket for disposition without oral argument.

### APPEARANCES

Timothy A. Short of Pittsburg, Kansas, appeared for claimant. Troy A. Unruh of Pittsburg, Kansas, appeared for respondent and its insurance carrier (respondent).

### RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

### ISSUES

Claimant injured his low back on February 14, 2003, while working for respondent. The parties stipulated claimant's accidental injury arose out of and in the course of employment with respondent, a plumbing company.

In the May 9, 2005, Award, Judge Hursh determined claimant's average weekly wage was $458.30 and, consequently, that claimant sustained a 92 percent wage loss due to his low back injury. The Judge also determined claimant failed to prove the percentage of former tasks that he lost due to this accident and, therefore, the Judge utilized a zero

percent task loss for purposes of calculating permanent partial general disability benefits under K.S.A. 44-510e. Averaging a 92 percent wage loss with a zero percent task loss, the Judge computed claimant's permanent partial general disability at 46 percent.

Claimant argues Judge Hursh erred. First, claimant contends his Notice of Appeal, which was filed with the Division of Workers Compensation on May 27, 2005, should be considered timely as he had no notice of the Award entered by Judge Hursh until May 24, 2005, when claimant's attorney spoke with respondent's counsel. Claimant contends his attorney did not receive a copy of the Award despite the fact the Award shows a copy was mailed to the correct post office box.

Second, claimant argues his average overtime should be computed by averaging the total amount of overtime paid by 20 weeks rather than 26 weeks. Consequently, claimant contends the Board should increase his gross average weekly wage to $463.02.

Claimant next contends he is entitled to receive temporary total disability benefits from February 14, 2003, through February 17, 2004, and, therefore, he is entitled to receive one extra week of those benefits at the appropriate rate.

Finally, claimant argues Judge Hursh erred by not considering Dr. Edward J. Prostic's task loss opinions as claimant corrected the descriptions of certain work tasks that were provided by human resources consultant Jerry D. Hardin. Accordingly, claimant requests the Board to use a 64 percent task loss in calculating his permanent partial general disability.

In summary, claimant requests the Board to (1) accept jurisdiction over this appeal, (2) increase his average weekly wage to $463.02, (3) award him additional temporary total disability benefits for 52.71 weeks at the appropriate rate, (4) increase his task loss from zero to 64 percent, and (5) award him benefits for a 78 percent permanent partial general disability.

Conversely, respondent contends the Board does not have jurisdiction over this claim as claimant's appeal was not timely. Respondent also argues claimant failed to prove he made a good faith effort to find appropriate employment. Moreover, respondent contends claimant failed to prove his task loss for purposes of K.S.A. 44-510e. In short, respondent argues claimant's permanent partial general disability should be limited to his whole person functional impairment rating, which respondent contends is 13 percent. Accordingly, respondent requests the Board either to dismiss this appeal or, in the alternative, to reduce claimant's permanent partial general disability from 46 percent to 13 percent.

The issues before the Board on this appeal are:

1. Does the Board have jurisdiction to review the May 9, 2005, Award, despite the fact claimant did not file his appeal within 10 days of the effective date of the Award?

2. Should claimant's overtime be averaged over 20 or 26 weeks in computing claimant's average weekly overtime?

3. Is claimant entitled to an additional week of temporary total disability benefits and what is the appropriate rate for those benefits?

4. What is claimant's wage loss and what is claimant's task loss for purposes of determining his permanent partial disability under K.S.A. 44-510e?

## FINDINGS OF FACT

After considering the entire record and the parties' arguments, the Board finds, as follows:

Claimant, who worked for respondent as a plumber, injured his low back on February 14, 2003, while lifting a heavy bag of cement. The parties stipulated claimant's low back injury arose out of and in the course of his employment with respondent.

Following the February 2003 accident, it was determined claimant had a herniated disc in his low back. In May 2003, claimant underwent a laminectomy, which did not relieve his symptoms. And in October 2003, claimant underwent a fusion with cages at the fifth lumbar and first sacral intervertebral levels.

When claimant testified at his February 2005 regular hearing, he was continuing to experience pain down into his right leg despite ongoing medical treatment with Dr. Steven L. Hendler. According to claimant, he now has problems with prolonged standing, prolonged sitting, riding long distances in vehicles, bending at the waist, lifting, and walking.

At the regular hearing, claimant testified he had reviewed the list of former work tasks prepared by human resources consultant Jerry D. Hardin and set forth in a report dated January 28, 2005. Although claimant thought the task list was accurate for the most part, claimant disagreed as to Mr. Hardin's conclusion that he could perform certain tasks. For example, claimant testified he was not able to operate a sewer machine as that task required him to bend over and that he was unable to lift the 250-pound machine in and out of the van. Claimant also testified he was unable to perform many of the tasks identified as "cleaned up" as those tasks required him on occasion to lift much heavier weights than the amounts specified by Mr. Hardin. In addition, claimant added that he might not be able to perform the task of sewing bags of seed as it depended upon how that task was performed. Furthermore, claimant stated he would have difficulty walking and patrolling

an area, standing and holding a sign, and driving for any prolonged period as he was limited by the amount of time he could stand, walk, and sit. And finally, claimant testified how he would have difficulty riding on the back of a trash truck due to the rough ride.

Claimant was unable to work due to his low back injury and resulting surgeries from the date of accident through February 17, 2004, when Dr. Cole released him to return to work.[1]

Claimant spoke to respondent about returning to work but was told he needed to be able to lift 100 pounds. After being released to return to work, claimant contacted some other potential employers and contacted job service but has not found any job, except for a part-time job doing some sheetrock repair that lasted approximately 1½ months. After the sheetrock job, claimant attended a Missouri taxidermy school, which he completed in two months. Claimant wants to start a taxidermy business but he has been unable to afford a tanner, which costs over $1,000.

Although claimant testified he had a list of potential employers that he contacted, he did not introduce that list into evidence. Moreover, claimant testified he has been given no job interviews. Consequently, when claimant testified at the February 2005 regular hearing he was not earning any wages.[2] The only evidence of claimant's ability to earn wages is set forth in the January 28, 2005, report from claimant's vocational expert, Mr. Hardin. That report indicates claimant retains the ability to earn approximately $280 per week.[3]

The record contains three expert medical opinions regarding the work restrictions claimant should observe due to his injury and three expert opinions regarding claimant's whole person functional impairment rating. But the record contains only one expert medical opinion regarding the loss of former work tasks that claimant sustained due to his low back injury.

Claimant presented the testimony of Dr. Edward J. Prostic, a board-certified orthopedic surgeon, who examined claimant in November 2004 at claimant's attorney's request. Dr. Prostic concluded claimant sustained a 25 percent whole person functional

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[1] Brown Depo., Ex. 1 at 2.

[2] This appears contradicted by the January 28, 2005, office notes from Dr. Hendler, which indicate claimant was working approximately 15 hours per week performing general light maintenance work. But the record does not address this inconsistency.

[3] R.H. Trans., Cl. Ex. 2.

impairment as measured by the AMA *Guides*[4] (4th ed.). Moreover, the doctor determined claimant should observe certain work restrictions and limitations, as follows:

> He [claimant] should not lift more than 30 pounds occasionally or 10 pounds frequently, with all significant lifting in the optimum position for his low back. He should avoid frequent bending or twisting at the waist, forceful pushing or pulling, more than minimal use of vibrating equipment or captive positioning.[5]

According to Dr. Prostic, those restrictions prohibited claimant from performing approximately 55 of 82 (or 67 percent) of the work tasks he performed in the 15-year period before his February 2003 low back injury. That 67 percent task loss is derived by excluding those tasks that Mr. Hardin indicated were merely duplicated.

Respondent, on the other hand, presented the testimony of Dr. C. Reiff Brown, who is also a board-certified orthopedic surgeon. Dr. Brown examined claimant in mid-April 2004 at the request of respondent's insurance carrier and concluded claimant sustained a 19 percent whole person functional impairment under the AMA *Guides* (4th ed.) due to his February 2003 back injury. The doctor utilized the Diagnosis-Related Estimates (DRE) method set forth in the *Guides*, which the doctor noted did not include any impairment due to claimant's physical deconditioning.

Dr. Brown concluded claimant should observe certain work restrictions and limitations. The doctor testified, in part:

> I recommended that his lifting be restricted to occasional, 25 pounds, with frequent lifting restricted to 15 pounds, and all lifting should be done utilizing proper body mechanics and primarily using the arms and legs. I advised that he avoid frequent flexion of his spine and frequent rotation of his spine, more than 30 degrees.[6]

But Dr. Brown was not asked to comment upon claimant's loss of former work tasks.

Respondent also presented the testimony of Dr. Steven L. Hendler, who is board-certified in physical medicine and rehabilitation. Dr. Hendler saw claimant on four occasions from mid-May 2004 through the end of July 2004 and prescribed pain medications and a work conditioning program. The doctor determined claimant had reached maximum medical improvement and released him with a 40-pound lifting

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[4] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

[5] Prostic Depo. at 10.

[6] Brown Depo. at 14.

restriction. In early August 2004, the doctor prepared a rating report, which indicated claimant had a 13 percent whole person functional impairment under the AMA *Guides* (4th ed.). Dr. Hendler likewise was not asked to comment upon any task loss that claimant sustained due to his February 2003 back injury.

When Dr. Hendler testified in April 2005, he had last seen claimant in late January 2005 to adjust his medications. Claimant has follow-up visits scheduled with Dr. Hendler so the doctor can monitor his medications.

## CONCLUSIONS OF LAW

### 1. Does the Board have jurisdiction to review the May 9, 2005, Award?

The Judge entered the Award in this claim on May 9, 2005. Pursuant to statute, the effective date of the Award is "the day following the date noted in the award."[7] Excluding Saturdays, Sundays, and legal holidays, parties have 10 days to request this Board to review an administrative law judge's order or award.[8]

Claimant's attorney contends he did not receive a copy of the May 9, 2005, Award entered by Judge Hursh. The Award indicates that a copy was mailed to claimant's attorney at the correct post office box. Claimant's attorney learned of the May 9, 2005, Award on May 24, 2005, and filed a request for Board review on May 27, 2005. In order to rebut the presumption that the Award was mailed and received, claimant introduced the affidavits from Nancy Boman, Linda Flanagan, and Timothy A. Short, which state the Award was not received from the Division of Workers Compensation in the mail picked up from May 9, 2005, through May 13, 2005, and May 16, 2005, through approximately May 31, 2005, and that Mr. Short did not receive any mail from the Division of Workers Compensation containing the Award and he did not have knowledge that the Award had been issued until being informed of the decision by respondent's attorney on May 24, 2005.

Claimant argues the *Nguyen*[9] case requires the Board to treat his request for review as timely. The Board agrees. *Nguyen* indicates that due process requires notice be given the parties and that both mailing and receipt of the Award are required to constitute notice.

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[7] K.S.A. 44-525(a).

[8] K.S.A. 2004 Supp. 44-551(b)(1).

[9] *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

> IBP argues that the mere filing of the award by the ALJ is all that is required to commence the running of the time limit for filing an application for review. IBP is correct where the filing of the award is accompanied by notice to the parties. **However, the filing of an award is not notice to the parties; it is the mailing of the award and receipt of the award by the parties that constitutes notice.** Where, as in the usual case, the ALJ mails the award to the parties upon filing the award, the date after the filing is effective to commence the running of the time for filing an application for review. However, where the award is misaddressed to the extent the claimant fails to receive the award prior to the running of the time limitation, notice sufficient to satisfy due process has not been provided.[10] (Emphasis added.) (Citation omitted.)

Accordingly, receipt of an award is imperative. Claimant's attorney, who is an officer of the Court, represents that he did not receive the May 9, 2005, Award until obtaining a copy from respondent's counsel on May 24, 2005. The Board finds no reason to doubt claimant's attorney's contention. Consequently, the Board finds claimant did not receive the May 9, 2005, Award on a timely basis and, therefore, claimant did not receive notice as required by due process. The Board concludes the May 27, 2005, request for review was timely. Consequently, the Board has jurisdiction to review the May 9, 2005, Award.

**2. Should claimant's overtime be averaged over a 20- or 26-week period?**

The only issue regarding claimant's average weekly wage is whether the overtime should be averaged over a 20- or 26-week period. At the regular hearing, the parties agreed to the admission of a wage statement that set forth claimant's wages during the 26 weeks before his February 14, 2003, accident. The wage statement indicated claimant did not receive any wages during the six-week period from September 13, 2002, through October 24, 2002.

The Board finds claimant did not work during the six-week period that he did not receive wages as indicated by the wage statement. Accordingly, claimant's average overtime is computed by averaging his total overtime earnings during the 26-week period before the accident by 20 weeks. Dividing $260.33 by 20 weeks yields an average weekly overtime sum of $13.02. Therefore, $13.02 is added to claimant's straight-time wages of $450 to produce an average weekly wage of $463.02.

**3. Is claimant entitled to additional temporary total disability benefits?**

At the regular hearing, the parties represented respondent paid claimant 51.7 weeks of temporary total disability benefits at $300.02 per week.

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[10] *Id.* at 589.

Claimant contends he is entitled to receive temporary total disability benefits from the date of injury, February 14, 2003, through February 17, 2004. Moreover, claimant maintains he was underpaid the temporary total disability benefits he received. The Board agrees.

First, as indicated above, claimant's corrected average weekly wage is $463.02, which makes claimant's temporary total disability rate $308.70 per week. Second, Dr. Brown's April 15, 2004, medical report to Allied Insurance, which the parties introduced at the doctor's deposition, indicated that on February 17, 2004, Dr. Cole released claimant from medical treatment following claimant's back surgery and also provided a permanent functional impairment rating. Accordingly, the Board concludes claimant is entitled to receive temporary total disability benefits from the date of accident, February 14, 2003, through February 17, 2004, when he was rated and released. And that period is 52.71 weeks.

**4. What is the extent of claimant's impairment and disability?**

The Board affirms the Judge's finding that claimant sustained a 19 percent whole body functional impairment due to his February 2003 low back injury. The Board, however, has also considered Dr. Brown's functional impairment rating, which was based upon the AMA *Guides* (4th ed.) and, according to the doctor, was not inflated due to claimant being deconditioned. Averaging the 25 percent, 19 percent, and 13 percent whole person functional impairment ratings provided by Drs. Prostic, Brown, and Hendler, respectively, yields 19 percent.

Because claimant has sustained an injury that is not listed in K.S.A. 44-510d, the "scheduled injury" statute, claimant's permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[11] and *Copeland*.[12] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual wages being received when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[13]

The Kansas Court of Appeals in *Watson*[14] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker fails to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based on all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[15]

The Board concludes claimant has failed to prove he made a good faith effort to find appropriate employment. Claimant's testimony regarding his job search is rather nebulous. According to claimant, he has looked for work through job service and newspapers, and he has contacted companies for which respondent had performed work. But, claimant has failed to establish and otherwise quantify how often he contacted potential employers, the total number of contacts he made, how he selected his contacts, how he contacted the

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[11] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[12] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[13] *Id.* at 320.

[14] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[15] *Id.* at Syl. ¶ 4.

potential employers, what type of work he was seeking, whether the job contact had any job openings, whether he made any follow-up contacts, or any other relevant factor that would help the Board in determining whether claimant has made a good faith effort to find work.

In short, claimant's job search efforts during the year between February 2004, when he was released by Dr. Cole, and February 2005, when claimant appeared at the regular hearing, had resulted in a part-time job that lasted approximately six weeks and no interviews. Whether a worker has made a good faith effort to find appropriate employment is a question of fact that is decided on a case-by-case basis. And in this instance, claimant has failed to satisfy his burden of proof.

The January 28, 2005, report from Mr. Hardin indicates claimant retains the ability to earn $280 per week. Accordingly, the Board concludes $280 per week should be used as claimant's post-injury wage for purposes of the permanent partial general disability formula. Comparing $280 to claimant's pre-accident average weekly wage of $463.02 produces a 40 percent wage loss.

The next variable in the permanent partial general disability formula is task loss. As indicated above, the only task loss opinion was presented by Dr. Prostic. Averaging Dr. Prostic's 67 percent task loss percentage with the 40 percent wage loss creates a 54 percent permanent partial general disability. The Board finds that Dr. Prostic's task loss opinion may be properly used in determining claimant's permanent partial general disability as claimant criticized the descriptions of some of his former tasks on the basis that they were understated and, thus, his task loss was greater than Mr. Hardin had opined. Accordingly, the record establishes that claimant has sustained, at a minimum, a 67 percent task loss when duplicate tasks are excluded.

Finally, the Board concludes claimant should receive ongoing conservative medical treatment. The evidence is uncontradicted that when the record closed claimant was receiving medications from Dr. Hendler that would continue into the future. Claimant needs to be monitored and should not be required to seek and obtain respondent's permission before every follow-up visit with the doctor. Claimant should, however, be required to seek additional authorization for any medical benefits other than for conservative treatment.

## AWARD

**WHEREFORE**, the Board modifies the May 9, 2005, Award, as follows:

Jason A. Johnson is granted compensation from Brooks Plumbing and its insurance carrier for a February 14, 2003, accident and resulting disability. Based upon an average weekly wage of $463.02, Mr. Johnson is entitled to receive 52.71 weeks of temporary total

disability benefits at $308.70 per week, or $16,271.58, plus 203.74 weeks of permanent partial general disability benefits at $308.70 per week, or $62,894.54, for a 54 percent permanent partial general disability. The total award is $79,166.12.

As of October 20, 2005, Mr. Johnson is entitled to receive 52.71 weeks of temporary total disability compensation at $308.70 per week, or $16,271.58, plus 87.29 weeks of permanent partial general disability compensation at $308.70 per week, or $26,946.42, for a total due and owing of $43,218, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $35,948.12 shall be paid at $308.70 per week until paid or until further order of the Director.

Claimant is awarded future ongoing medical benefits for conservative treatment only. Claimant is required to seek authorization for medical benefits other than conservative treatment.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this ____ day of October, 2005.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

## DISSENT

The undersigned Board Member respectfully dissents from the opinion of the majority. The majority found that claimant did not receive timely notice of the May 9, 2005 Award issued by Administrative Law Judge Kenneth J. Hursh. Claimant's attorney argued that even though the Award was issued properly, it never arrived at his office for reasons

totally unknown. The Board, therefore, concluded that the May 27, 2005 request for review was timely, even though beyond the 10-day time limit set forth in K.S.A. 44-551(b)(1). The Board, in reaching this conclusion, properly cites *Nguyen.*[16] However, the undersigned Board Member disputes that the *Nguyen* logic would allow the finding reached by the majority. In *Nguyen*, the decision of the administrative law judge was issued to the parties on July 29, 1996. The special administrative law judge who issued the award mistakenly placed the zip code for Topeka, Kansas, on the claimant's attorney's address, even though that claimant's attorney was located in Emporia, Kansas. After a circuitous route, the United States post office ultimately delivered the award to Nguyen's attorney on September 6, 1996. The issue addressed by the Kansas Supreme Court was whether the administrative law judge's error in addressing Nguyen's notice of award, which delayed Nguyen's receipt of the award until after the 10-day period for filing an application for review had expired, tolled the time for filing an application for review. The Kansas Supreme Court discussed at length the issues dealing with the timeliness of notice and the due process rights of parties under not only the Kansas Workers Compensation Act, but also the Kansas Constitution and the Kansas Code of Civil Procedure. The Kansas Supreme Court determined, as noted by the majority, that the filing of an award is not notice to the parties; it is the mailing of the award and receipt of the award by the parties that constitutes notice.[17] The court went on to state,

> Notice should be more than a mere gesture; it should be reasonably calculated, depending upon the practicalities and peculiarities of the case, to apprise interested parties of the pending action and afford them an opportunity to present their case. (Citation omitted.)
>
> . . . However, where the award is misaddressed to the extent the claimant fails to receive the award prior to the running of the time limitation, notice sufficient to satisfy due process has not been provided.[18]

The Kansas Supreme Court found that incorrectly addressing Nguyen's Award, with the result being that Nguyen received the Award well after the statutory time limit, was not a method of notice which was reasonably calculated to apprise Nguyen of the decision and afford him an opportunity to present his objections. In this instance, it should first be noted that claimant's attorney's address was properly listed on the Award of the Administrative Law Judge. There is not a dispute in this instance, as in *Nguyen*, that the Award was misaddressed or, in some fashion, delivered to the wrong address. There are affidavits

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[16] *Nguyen v. IBP, Inc.*, 266 Kan. 580, 972 P.2d 747 (1999).

[17] *Id*. at 589.

[18] *Id*. at 589.

by claimant's attorney and his staff which state that, for whatever reason, they did not receive the Award in the United States mail. K.S.A. 77-613 and K.S.A. 60-205 require service (notice) of an order or other papers to be mailed to the last known address of the party or the party's attorney.[19]

In this instance, that was accomplished.

Additionally, in this instance, the attorney for claimant contacted the attorney for respondent and was advised on May 24, 2005, that the Award had been issued. The affidavit filed by claimant's attorney states that he had no knowledge of the Award or that the Award had been issued until informed of the decision by respondent's attorney on the afternoon of Tuesday, May 24, 2005. The very significant fact is that May 24, 2005, was the tenth day after the effective date of the Award. The Award was dated May 9, with the effective date of that act being the day following the date noted on the document.[20] K.S.A. 44-551 then mandates that an appeal be filed within 10 days. Counting 10 days (excluding weekends and holidays) after the effective date calculates that the tenth day falls on May 24, 2005. Therefore, claimant's attorney, while understandably short on the notice, was apprised of the existence of the decision on the tenth day following the Award. Claimant's attorney, however, did not file the appeal until three days thereafter.

K.A.R. 51-18-2(c) states, "[a]n application for review may be filed by facsimile directly to the division of workers compensation." In this instance, even though being apprised of the Award on the tenth day, no such fax filing was attempted. In this age of instant electronic gratification, such an error is unacceptable. This Board Member would find for the above reasons that the filing of the appeal on May 27, 2005, was not timely, but rather was in violation of K.S.A. 44-551 and the appeal should, therefore, be dismissed.

BOARD MEMBER

c: Timothy A. Short, Attorney for Claimant
Troy A. Unruh, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

[19] *Id.* at 584.

[20] K.A.R. 51-18-2.